Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1994

In Re: JAMES CONSTANT,

Debtor.

ARGEREY CONSTANT, JAMES CONSTANT

Petitioners,

v.

DAVID L. RAY, SALTZBURG, RAY & BERGMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Argerey Constant
James Constant
1603 Danbury Dr
Claremont, CA 91711
(909) 624-1801

Pro-per Petitioners

QUESTIONS PRESENTED

Should this Court resolve direct conflicts between the court of appeal's decision on jurisdiction and decisions on jurisdiction of this Court and other Circuit Courts on the following matters:

Does Civil Rule 12(h)(3) require that a court must decide a question of jurisdiction before it?

Does patent statute 35 USC 261 bar a court's jurisdiction to void the assignment of United States Patents by operation of California State laws?

Does judgement lien statute 28 USC 1962 bar a court's jurisdiction to hear a suit to void the assignment of United States patents by operation of California State laws?

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Petitioners,

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DAVID L. RAY, SALTZBURG, RAY & BERGMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Argerey Constant and James Constant, respectfully pray that a writ of certiorari issue to review the Memorandum of the United States Court of Appeals for the Ninth Circuit entered on September 12, 1994 affirming the district court's (1) dismissal of Mr. Constant's appeal for lack of standing, (2) dismissal of Mrs. Constant's appeal from certain bankruptcy court decisions for untimely filing, and (3) sanction award.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals appears in APPENDIX A to this Petition. The order dismissing appeal in the District Court for the Central District of California appears in APPENDIX B to this Petition.

JURISDICTION

The Court of Appeal's Opinion in this matter was entered on 12 September, 1994. This Court's jurisdiction is invoked under Title 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

Jurisdictional statutes 28 USC 1334, 28 USC 157(b)(2)(H), 11 USC 544(b); Bankruptcy Rule 12(h)(3); judgement lien statute 28 USC 1962; and patent statute 35 USC 261 are set forth in APPENDIX C.

STATEMENT OF THE CASE

Before the petition for bankruptcy was filed, debtor had assigned 22 patents to his wife pursuant to patent statute 35 USC 261 governing the assignment of United States Patents and voidance thereof. Unsecured creditors had a judgement lien against the debtor pursuant to 28 USC 1962 and demanded payment. Debtor filed for bankruptcy and the bankruptcy trustee brought the instant case in the bankruptcy court against debtor's wife under California laws to recover patents allegedly transferred by debtor in fraud of creditors.

In his motion to intervene in the bankruptcy court, debtor argued that the court lacked jurisdiction to decide the voidance of assignment of United States patents under California state laws Cal. Codes 3439.04 and 3439.05. Debtor also argued that judgement lien statute 28 USC 1962 does not apply to patents and thus bars pre-petition judgement lien creditors (and the trustee who fills their shoes under 11 USC 544(b)) from bringing suit in California to recover United States patents from Mrs. Constant. Similar arguments were made by debtor and his wife in their appeals to the district and circuit courts.

The bankruptcy court denied debtor's motion to intervene and entered final judgement voiding the assignment of 22 patents by debtor to his wife under California state laws Cal. Codes 3439.04 and CC 3439.05. The district and appeals courts affirmed the bankruptcy court's holding that "Mr. Constant has no standing" to intervene and appeal. See APPENDICES A and B.

The bankruptcy court had jurisdiction pursuant to 28 USC 1334 [Bankruptcy Cases and Proceedings], 28 USC 157(b)(2)(H) [Proceedings to Determine, Avoid, or Recover Fraudulent Conveyances], and 11 USC 544 [trustee may avoid transfer of property]. The trustee's action was brought under 11 USC 544(b) which provides that the trustee may avoid any transfer by debtor "that is voidable under applicable law"[1]. As argued by the Constants, (1) the applicable non-bankruptcy law under 11 USC 544(b) is federal patent statute 35 USC 261 governing the assignment and the voiding of assignment of United States patents, (2) California state laws Cal. Codes 3439.04 and 3439.05 are inapplicable under 11 USC 544(b) because the voiding of assignment of United States patents is governed by 35 USC 261, and (3) judgement lien statute 28 USC 1962 does not apply to patents and thus bars action by creditors (and the trustee) to recover United States patents in California.

The court of appeals rejected the Constant's contentions that the bankruptcy and district courts lacked jurisdiction over

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[1] Section 544(b) gives the trustee the rights of actual unsecured creditors under applicable law to void transfers "under applicable law".

the trustee's action to recover United States patents from Mrs. Constant, without considering the "applicable law" issue under 11 USC 544(b) raised by petitioners. See n.1 (third sentence) in APPENDIX A. The court of appeals held that judgement lien statute 28 USC 1962 is inapplicable. See second paragraph at page 6 in APPENDIX A.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reasons that the opinions below conflict with previous decisions on jurisdiction of this Court and with the decisions of other Circuits.

The following points of law were overlooked by the appeals court:

1. Whether Bankr. R. 12(h)(3) requires a court to determine the jurisdictional issue raised by petitioners.

2. Whether federal patent statute 35 USC 261 is the applicable law under 11 USC 544(b) to void the transfer of United States patents.

3. Whether California state laws Cal. Code 3409.04 and 3409.05 are inapplicable under 11 USC 544(b) to void the transfer of United States patents.

4. Whether 28 USC 1962 bars prepetition judgement lien creditors (and the trustee who fills their shoes) from bringing suit in California to recover United States Patents from Mrs. Constant.

A. Civil Rule 12(h)(3) Requires That A Court Must Decide A Question Of Jurisdiction Before It

Reaching the merits of the jurisdictional issues raised by the petitioners does not require Mr. Constant to have standing and does not require Mrs. Constant to have filed a timely appeal. Bankr. R. 12(h)(3). The dismissal of appeals on grounds Mr. Constant lacked standing and Mrs. Constant lacked timely filing were made without considering Bankr. R. 12(h)(3) which permits raising a jurisdictional question at any time by suggestion of a party or non-party.

If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue. See numerous decisions in *Wright, Miller, Cooper, Federal Practice And Procedure, Jurisdiction 2d* 3536 footnote 2. A party may always suggest that the court lacks jurisdiction. *Moore's Federal Practice 2d ed. 1994* 12-237 n.21. Challenges to jurisdiction may be brought to the court's attention by persons other than parties to the action. *New York, v. Waterfront Airways, Inc.* (SD NY 1985) 620 F Supp 411. The court at any stage of the proceedings has a duty to raise such a defect on its own initiative. *Id* 12-239 n.23. The question whether or not there is subject matter jurisdiction is open to challenge at any time and at any level of adjudication. *Sadat v. Mertes* (CA7 1980) 615 F2d 1176, 54 ALR Fed 401. Subject matter jurisdiction can be challenged even after judgement. *Eisler v. Stritzler* (CA1 1976) 535 F2d 148, 21 FR Serv2d 1380; *Alexander v. Allister* (ND Ill 1976) 424 F Supp 277. An appellate court can consider the question of lack of subject

matter jurisdiction even on its own motion and even where the issue was not raised in the district court. *Wymard v. McCloskey & Co.* (CA3 1965) 342 F2d 495 *cert. den.* 382 US 823, 15 LEd2d 68, 86 SCt 52; *Rice v. Rice Foundation* (CA7 1979) 610 F2d 471; *Velez v. Crown Life Ins. Co.* (CA1 1979) 599 F2d 471. Even this Court will raise lack of jurisdiction of the subject matter on its own motion when the case reaches that late stage. *Louisville & N.R.Co. v. Mottley* (1908) 211 US 149, 53 LEd 126, 29 SCt 42.

Where there is no subject matter jurisdiction, a court has no discretion to ignore lack of jurisdiction. *Joyce v. United States (CA3 1973)* 474 F2d 215; *International Video Corp. v. Ampex Corp.* (CA9 1973) 484 F2d 634, 179 USPQ 260, 17 FR Serv2d 1240. A court lacking subject matter jurisdiction cannot render judgement, but must dismiss the case at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking. *Basso v. Utah Power & Light Co.* (CA10 1974) 495 F2d 906, 18 FR Serv2d 937.

The court's decisions below were made without an inquiry into the questions of subject matter jurisdiction under 11 USC 544(b), 35 USC 261 and 28 USC 1962 raised by petitioners.

B. Patent Statute 35 USC 261 Bars The Jurisdiction of A Court To Void The Assignment of United States Patents By Operation Of California State Law

1. *Re Peregrine* 116 BR 194,205 footnote 16 held that "while it appears that in California a judicial lien may, in fact, be used to encumber a copyright [or patent], that is only half the task; the court must also determine whether federal law insulates copyrights [or patents] from attachment by state court procedures". As to patents, state law is limited to determining the relative rights of creditors and patent exemptions. *Re Transportation Design* (BC SD Cal. 1985) 48 BR 635,639-40.

2. State law may not nullify the patent laws of Congress regulating their transfer. *Allen v. Riley* (1906) 203 US 347. Federal regulation under 35 USC 261 preempts state law. *Re Peregrine* 116 BR 194,206 footnote 17. Where federal law excludes state law, the court must apply the federal law. *Re Velikoplejki* (BC SD Fla 1985) 54 BR 534,538; *Re Transportation Design* (BC SD Cal 1985) 48 BR 635,639-40; *Unarco Industries, Inc. v. Kelley Co.* (CA7 1972) 465 F2d 1302,1305-06.

3. 35 USC 261 governs the assignment, and voidance of assignment of patents. Questions of patent assignments arise under the patent laws. *Crown Die & Tool Co. v. Nye Tool & Machine Works* (1923) 261 US 24, 67 LEd 516, 43 SCt 254; SCt background *US LEd Digest* Courts 291; *Geni-Chlor Int'l, Inc. v. Multisonics Dev. Corp.* (CA9 1978) 580 F2d 981, 200 USPQ 67.

4. In *Re Peregrine* (Bkrtcy. CD Cal 1990) 116 BR 194 the court was faced with the same issue which is now before this Court, i.e., should a creditor have the status of a bona fide purchaser, rather than that of a judicial lien creditor. Creditor Cap Fed argued that the term transfer in section 205(d) of the Copyright Act refers only to consensual transfers. The court rejected this argument

> "The Copyright Act's definition of transfer is very broad and specifically includes transfers by operation of law. 17 USC 201(d)(1). The term is broad enough to encompass not merely purchasers but lien creditors as well." *Id* 206. However, in footnote 17, the court distinguished the Patent Act "Unlike 17 USC 205(d), the priority scheme created under the Patent Act specifically applies only to subsequent purchasers and mortgagees. 35 USC 261. Lien creditors are neither." *Id* 206 footnote 17.

The court held that Cap Feds earlier prepetition unperfected security interest in NPI's **copyrights** is trumped by NPI's hypothetical judicial lien. Id 207.

5. Mrs. Constant's ownership of patents trumps the creditor's unsecured and unperfectable claim. Creditors are not secured creditors that could have perfected their security interests by filing in the Patent Office. Unsecured, unperfected interests have no claim to title under 35 USC 261. *Id* 206 footnote 17. Under 35 USC 261 the creditor must have the status of a bona fide purchaser, rather than that of unsecured creditor since 35 USC 261 refers only to consensual transfers.

Judgement lien creditors are not purchasers or mortgagees under 35 USC 261. Re Per*egrine* 116 BR 194,206 footnote 17. A judgement lien creditor is not a bona fide purchaser. *Re Mellor* (CA9 1984) 734 F2d 1396, 1941. Accordingly, creditors (and the trustee who fills their shoes) are not entitled to file their pre petition judgement lien in the Patent Office to void the assignment of Mrs Constant's patents under 35 USC 261. Nor does the trustee have rights under 11 USC 544(b) superior to those of unsecured creditors. By bringing its suit to recover patents under California law, the bankruptcy trustee has obtained rights not otherwise available to creditors under patent statute 35 USC 261.

C. Judgement Lien Statute 28 USC 1962 Bars The Jurisdiction Of A Court To Hear A Suit To Void The Assignment of United States Patents By Operation Of California State Law

Nor is creditor's pre-petition judgement a lien under 28 USC 1962 that would entitle them (and the trustee who fills their shoes) to bring suit against Mrs Constant, because patents have no situs for jurisdictional purposes. "Intellectual property, such as patents, is the most intangible form of property", *Filmtec Corp. v. Allied Signal, Inc.* (CAFC 1991) 939 F2d 1568, 1570 n.5, "with no situs for jurisdictional purposes", see *4 Wright & Miller, Federal Practice and Procedure* 1071, at 429-30 (1987) (rule that jurisdiction can be based on location of property "obviously has no relevance when the debt or obligation is not embodied in a writing at all, as is true of patents").

Thus, creditors are not even lienholders under 28 USC 1962 because their claims based on their pre-bankruptcy judgement lien does not apply to patents. Accordingly, creditors (and the trustee who fills their shoes) are not entitled to file their judgement lien in a court to void the assignment of patents by operation of California state law. Nor does the trustee have rights under 11 USC 544(b) superior to those of unsecured creditors. By bringing its suit to recover patents under California law, the bankruptcy trustee has obtained rights not otherwise available to creditors under judgement lien statute 28 USC 1962.

D. Conflicts Of Decisions

(a) Courts Must Decide Questions On Jurisdiction Before Them

In rejecting the Constant's questions on jurisdiction under 11 USC 455(b) the court of appeals gives no reason why Cal. Codes 3409.04 and 3439.05, and not patent statute 35 USC 261, are the "applicable law" under 11 USC 544(b). While it properly cites jurisdictional statutes 28 USC 157(b)(1) and 28 USC 157(b)(2)(H), it ignores statute 11 USC 544(b) which limits the court's jurisdictional powers to "applicable law". See n.1 in APPENDIX A. And, the court of appeals gives no reason why judgement lien statute 28 USC 1962 is inapplicable. See second paragraph at page 6 in APPENDIX A. This is contrary to decisions of this Court and other Circuits. See citations in Part A *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and the numerous decisions in *Wright, Miller, Cooper, Federal Practice And Procedure, Jurisdiction 2d* 3536 footnote 2 (courts

lack discretion to ignore questions of jurisdiction of subject matter under Bankr. R. 12(h)(3)), **second**, to explicitly rule that courts must decide questions of jurisdiction brought to their attention by parties or otherwise and, **third**, to resolve the conflicts created by the Ninth Circuit's decision and the decisions in *Moore's Federal Practice 2d ed. 1994* 12-237 n.21 (a party may always suggest that the court lacks jurisdiction) and 12-239 n.23 (court at any stage of the proceedings has a duty to raise such a defect on its own initiative); in the decision of *New York, v. Waterfront Airways, Inc., supra,* (challenges to jurisdiction may be brought to the court's attention by persons other than parties to the action); in the decision of *Sadat v. Mertes, supra,* (the question whether or not there is subject matter jurisdiction is open to challenge at any time and at any level of adjudication); in the decisions of *Eisler v. Stritzler, supra*; *Alexander v. Allister, supra,* (subject matter jurisdiction can be challenged even after judgement); in the decisions of *Wymard v. McCloskey & Co., supra*; *Rice v. Rice Foundation, supra*; *Velez v. Crown Life Ins. Co., supra,* (an appellate court can consider the question of lack of subject matter jurisdiction even on its own motion and even where the issue was not raised in the district court; in the decision of this Court in *Louisville & N.R. Co. v. Mottley, supra,* (even this Court will raise lack of jurisdiction of the subject matter on its own motion when the case reaches that late stage); in the decisions of *Joyce v. United States, supra*; *International Video Corp. v. Ampex Corp., supra,* (where there is no subject matter jurisdiction, a court has no discretion to ignore lack of jurisdiction) and in the decision in *Basso v. Utah Power & Light Co., supra,* (a court lacking subject matter

jurisdiction cannot render judgement, but must dismiss the case at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking).

(b) Courts Lack Jurisdiction To Void The Assignment of United States Patents By Operation Of California State Law

The court of appeals cites Cal. Codes 3409.04 and 3439.05 for the implied proposition that the courts have jurisdiction to void the assignment of United States Patents under state laws. This is contrary to decisions of this Court and other Circuits. See citations in Part B *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and this Court's decision in *Allen v. Riley, supra* (state law may not nullify the patent laws of Congress regulating their transfer); and this Court's decisions in *Crown Die & Tool, supra*, and in *US LEd Digest* Courts 291, *supra*, (questions of patent assignments arise under the patent laws)[2], **second**, to explicitly rule that patent statute 35 USC 261 bars the jurisdiction of a court to void the assignment of United States patents by operation of state law[3] and, **third**, to resolve the conflicts created by the Ninth Circuit's decisions and the Seventh Circuit decision in *Unarco Industries, supra* (where federal law excludes state law, the court must apply the federal law).

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[2] The Ninth Circuit itself agrees. See *Geni-Chlor, supra.*

[3] The Ninth Circuit's decision conflicts with decisions in its own Circuit. See *Re Peregrine, supra* 205 footnote 16, 206 footnote 17; *Re Transportation Design, supra* at 639-640.

(c) Courts Lack Jurisdiction To Hear Suits To Void The Assignment of United States Patents By Operation Of California State Law

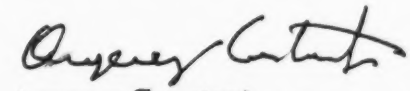
The court of appeals cites Cal. Codes 3409.04 and 3439.05 for the implied proposition that judgement lien statute 28 USC 1962 is not applicable to creditor's prepetition judgements so as to bar the trustee's action in California to recover patents. See second paragraph at page 6 in APPENDIX A. This is contrary to decisions of other Circuits. See citations in Part C *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and the decision in the Federal Circuit in *Filmtec, supra* and in the decisions in *4 Wright & Miller, Federal Practice and Procedure* 1071 at 429-30 (1987) (patents have no situs for jurisdictional purposes) and, **second**, to explicitly rule that judgement lien statute 28 USC 1962 bars the jurisdiction of a court to hear a suit to void the assignment of United States Patents by operation of California state law.

CONCLUSION

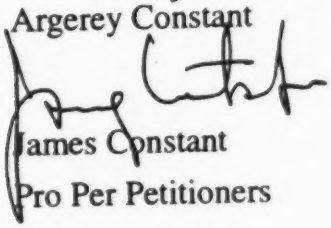
For the reasons set forth above, a writ of certiorari should issue to review the Memorandum opinion of the Court of Appeals on the question of its jurisdiction of subject matter in light of Civil Rule 12(h)(3), patent statute 35 USC 261, and judgment lien statute 28 USC 1962 raised by petitioners.[4]

Dated: 20 October, 1994

Respectfully submitted



Argerey Constant



James Constant

Pro Per Petitioners

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4 If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinions and opinions in the federal circuits cited in Parts A through C, *supra*.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(entered 12 September, 1994)

In re: JAMES CONSTANT,	)	Nos. 94-55053
	)	
Debtor,	)	D.C. No.
	)	93-04392-AWT
DAVID L. RAY, RAY & BERGMAN,	)	
	)	
Plaintiff - Appellee,	)	
	)	
v.	)	
	)	
ARGEREY CONSTANT; JAMES CONSTANT,	)	
	)	MEMORANDUM*
	)	
Defendants - Appellants.	)	

Appeal from the United States District Court for the Central District of California Manuel L. Real, District Judge, Presiding

Submitted September 7, 1994**

Before: HALL, WIGGINS, and FERNANDEZ, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir, R, 36-6.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Chapter 7 debtor James Constant and his wife, Argerey Constant, appeal pro se the district court's (1) dismissal of Mr. Constant's appeal for lack of standing, (2) dismissal of Mrs Constant's appeal from certain bankruptcy court decisions for lack of jurisdiction, and (3) sanction award. We have jurisdiction under 28 USC 158(d)[1], and we affirm.

I

STANDING

Mr. Constant contends that the district court erred by not reaching the merits of his appeal on on the ground that he lacked standing to appeal. We disagree.

Mr. Constant relies on Justice Steven's dissenting opinion in Martin v. Wilks for the propositition that interested third parties who have no right to appeal from a final judgement nevertheless may collaterally attack the judgement. See 109 SCt 2120, 2189 (1989) (Stevens, J., dissenting). Although a third party

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[1] We reject the Constant's contention that because the district court dismissed their appeal on standing and jurisdictional grounds, the district court's decision was not final and appealable. See McGuckin v. Smith, 974 F2d 1050,1053 (CA9 1992) (dismissals based on lack of jurisdiction are final and appealable). We also reject the Constant's contention that the bankruptcy and district courts lacked subject matter jurisdiction over the trustee's action to recover fraudulently conveyed patents from Mrs. Constant, and the Constant's appeal from the final judgement in that action. See 28 USC 157(b)(1) (bankruptcy judge may hear and determine core proceeding), 157(b)(2)(H) action to recover fraudulent conveyance is core proceeding), 158(a) (district courts have jurisdiction to hear appeals from final judgements of bankruptcy judges).

may under certain circumstances be able to collaterally attack a judgment, see, e.g., Wells Fargo & Co. v. Taylor, 254 U.S. 175, 184 (1920), a third party whose motion is denied is not a party and may not appeal directly any subsequent decision, see Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 524 (1947); see also Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 378 (1987). Moreover, in the bankruptcy context, "[o]nly those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court have" standing to appeal the order. Tilley v. Vucurevich (In re Pecan Groves), 951 F2d 242,245 (CA9 1991).

Here, Mr. Constant's motion to intervene was denied. He therefore was not a party to the adversary proceeding. See Brotherhood, 331 US at 524. Moreover, he has conceded that he had no interest in the patents that were subject of the adversary proceeding. Thus, he did not have standing to appeal directly the bankruptcy court's decisions to the district court. See id.; In re Pecan Groves, 951 F2d at 245.

II

DISTRICT COURT'S JURISDICTION.

Mrs Constant appealed three bankruptcy court "decisions" to the district court: (1) the March 12, 1993 judgement avoiding as fraudulent Mr. Constant's transfer of certain patents to his wife; (2) the March 15, 1993 order in aid of judgement, directing Mrs. Constant to assign the patents within ten days or the clerk would do so; and (3) the bankruptcy clerk's June 1,

1993 assignment of the patents. The district court concluded that the June 1, 1993 assignment was not an appealable order and that Mrs. Constant's appeal of the other bankruptcy court decisions was untimely. "The timeliness of a notice of appeal is a question of law which we review de novo". Delaney v. Alexander (In re Delaney), No. 93-16217, slip op. 7817,7819 (CA9 July 15, 1994) (per curiam).

First, district courts "have jurisdiction to hear appeals from final judgements, orders, and decrees, and ... interlocutory orders and decrees of bankruptcy judges". 28 USC 158(a). Here, the June 1, 1993 assignment was not a judgement, order, or decree. Moreover, it was executed by the court clerk, not the bankruptcy judge. Thus, the district court did not err by concluding that it was not an appealable order. See id.

Second, a notice of appeal from the bankruptcy court must be filed with the clerk within ten days from the date of entry of the order appealed from. Bankr. R. 8002 (a). "The provisions of Bankruptcy Rule 8002 are jurisdictional; the untimely filing of a notice of appeal deprives the appellate court of jurisdiction to review the bankruptcy court's order". Anderson v. Mouradick, 13 F3d 326,327 (CA9 1994).

Here, Mrs. Constant filed her notice of appeal on June 8, 1993. Because the notice was not filed within ten days of either the March 12, 1993 judgement or the March 15, 1993 order, the district court properly found it untimely. See Bankr. R. 8002(a).

III

DISTRICT COURT SANCTIONS

The Constants contend that the district court erred by sanctioning them for filing a frivolous appeal under Fed. R. Civ. P. 11 and Bank. R. 9011(a) because (1) the sanctions were not based on pleadings signed by the Constants, and (2) the district court never reached the merits of their appeal. We disagree.

A district court reviewing a decision of a bankruptcy court does not have the authority to impose sanctions under Rule 11, see Akros Installations, Inc. v. Grand Nat'l Bank (In re Akros Installations, Inc., 834 F2d 1526,1531 (CA9 1987), but may impose sanctions under the bankruptcy equivalent to Rule 11, Bankr. R. 9011[2], see Hedges v. RTC, Nos. 92-16952, 93-15606, slip op. 7713, 7719-20 (CA9 July 14, 1994) (per curiam). A court may sanction the signers of a pleading or other paper where the paper is frivolous, meaning it is baseless and done without reasonable inquiry. In re Grantham Bros., 922 F2d at 1441.

Here, contrary to their contention, the Constants signed the notice of appeal and appellant's brief submitted to the district court. Thus, the district court had authority to sanction them for filing a frivolous appeal. See Bankr. R. 9011.

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[2] Rule 11 recently was amended to remedy problems arising from certain amendments to the rule. See Fed. R. Civ. P. 11 (as amended Apr. 22, 1993, eff. Dec. 1, 1993) & advisory committee notes to 1993 amendments. Bank. R. 9011 is "virtually identical" to the pre-1993 version of Rule 11. See Valley Nat'l Bank v. Needler (In re Grantham Bros.), 922 F2d 1438,1441 (CA9), cert. denied, 112 SCt 94 (1991).

With respect to Mr. Constant, a reasonable inquiry would have revealed that he lacked standing to appeal because it was clear he was not a party to the adversary proceeding and thus, had no basis to appeal. See Brotherhood, 331 US at 524; see also Oil & Gas Co. v. Duryee, 9F3d 771,773 (CA9 1993) (sanctioning a putative appellant who lacked standing to file bankruptcy petition); cf. Bank of Maui v. Estate Analysis, Inc., 904 F2d 470,472 (CA9 1980) (reversing sanction award where whether party lacked standing had "not been authoritatively decided by this court"). Accordingly, Mr. Constant's appeal was frivolous. See In re Grantham Bros., 922 F2d at 1442.

As to Mrs. Constant, the fact that the district court lacked jurisdiction to consider the merits of her appeal did not preclude it from imposing sanctions. See Orange Prod. Credit Ass'n v. Frontline Ventures Ltd., 792 F2d 797,801 (CA9 1986); see also Willy v. Coastal Corp., 112 SCt 1076,1080-81 & n.5 (1992). First, Mrs. Constant argued that the bankruptcy court's judgement violated 28 USC 1962 because patents are intangible property with no situs in any state. Section 1962 is not applicable. See 28 USC 1962. Moreover, the bankruptcy court had authority to enforce its judgement by directing Mrs. Constant to assign her interest in the patent. See Bank. R. 7069; Fed. R. Civ. P. 69(a) (enforcement of judgements shall be in accordance with state procedures); Cal. Civ. Proc. Code 695.010 (all property of judgement subject to enforcement), 697.510(a) (judgement lien on personal property), 700.170 (levy on general intangibles).

Second, Mrs. Constant argued that the bankruptcy court's judgement violates 35 USC 261 because she was the proper

assignee of the patents. The bankruptcy court, however, explicitly found that Mrs. Constant did not act in good faith and was not entitled to the patents. See 11 USC 544; Cal. Civ. Code 3439.04, 3439.05. Thus Mrs. Constant's assignment could not have "trumped" that of the trustee's.

Finally, Mrs. Constant argued that the trustee's motion for sanctions violated Fed. R. Civ. P. 41(b) because the bankruptcy court already ordered the employment and compensation of certain attorneys for the benefit of the estate. An award of sanctions, however, punishes a party for filing a frivolous action, and does not compensate directly the other side's attorney. See Willy, 112 SCt at 1081.

Based on our review of the Constant's pleadings, the district court did not abuse its discretion by sanctioning the Constants. See Hedges, slip op. at 7720 (reviewing for abuse of discretion).

IV

APPELLATE SANCTIONS

The appellee requests that this court impose sanctions against the Constants for filing a frivolous appeal. This court has discretion to impose sanctions for bringing a frivolous appeal, even when a litigant is pro se. 28 USC 1912; Fed. R. App. P. 38; Urban v. Commissioner, 964 F2d 888,890 (CA9 1992) (per curiam). As appeal is frivolous "if the result is obvious, or the arguments of error are wholly without merit". Wilcox v.

Commissioner, 848 F2d 1007,1009 (CA9 1988). This court does not impose sanctions lightly as it is aware that an appeal that lacks merit is not always frivolous. Grimes v. Commissioner, 806 F2d 1451,1454 (CA9 1986) (per curiam).

Because the Constant's appeal is without merit, we impose sanctions of $1,000. See id.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(entered 24 November, 1993)

In re: JAMES CONSTANT,	)	
	)	
Debtor,	)	D.C. No.
	)	93-04392-AWT
DAVID L. RAY,	)	
Chapter 7 Trustee	)	Bankr.Case No.
	)	LA 89-19270 KL
Plaintiff-Appellee,	)	
	)	Adv. No.
	)	LA 91-06842 KL
v.	)	
	)	
ARGEREY CONSTANT,	)	ORDER
an individual,	)	DISMISSING
	)	APPEAL AND
	)	IMPOSING
Defendant-Appellant.	)	SANCTIONS
	)	

BACKGROUND

This is an appeal from an order of the Bankruptcy Court transferring 22 United States patents from Argerey Constant to the bankruptcy estate of James Constant in order to avoid a fraudulent transfer. Both James Constant and his wife have appealed. Mr. Constant is not a party to this adversary proceeding. Appellee has moved to dismiss the appeal and to impose sanctions on both appellants.

DISCUSSION

A. Mr. Constant Has No Standing To Appeal

Mr. Constant moved to intervene in this adversary proceeding. The Bankruptcy Court denied his motion. He did not appeal from that order. The Bankruptcy Court's denial of Mr. Constant's motion to intervene terminated his ability to appeal from any subsequent orders of the Bankruptcy Court. Stringfellow v. Concerned Neighbors In Action, 480 US 370,378 (1987) (applicant whose motion to intervene is denied may "not appeal from any subsequent order or judgement in the proceeding"). Thus, Mr. Constant's present appeal, which is directed to an order made subsequently to the denial of his motion to intervene, is barred.

B. Mrs. Constant's Appeal Is Untimely

Appellants filed their appeal on June 8, 1993. The Bankruptcy Court entered final judgement on March 12, 1993 and entered an Order In Aid Of Judgement Requiring the Assignment of Patents on March 15, 1993. The rules require that a notice of appeal be filed within 10 days after the entry of the order appealed from. Bankr. R. 8002(a). Appellant's filing occurred past this ten-day deadline. The Bankruptcy Clerk's June 1, 1993 execution of the assignment of patents was a purely ministerial act required by the March 15 order, and is not, itself, an appealable order. Mrs. Constant's appeal is, therefore, untimely.

C. The Constant's Appeal Warrants the Imposition of Sanctions

Mrs. Constant's appeal attempts to raise arguments not made in the trial court. These arguments are baseless and were rejected in her husband's previous appeals. More importantly, Mrs. Constant's former attorney warned her of the possibility of being sanctioned if she raised these arguments. The knowingly frivolous nature of Mrs. Constant's appeal warrants the imposition of sanctions.

Mr. Constant's attempt to appeal from an order in a proceeding in which he was not a party warrants the imposition of sanctions. See Oil & Gas Ins. Co. v. Illinois, No. 91-5678, 93 D.A.R. 13366 (CA9 Oct. 21, 1993) (awarding sanctions against appellant whose unauthorized appeal was an attempt to circumvent dismissal of unauthorized petition).

The sanctions against Mr. and Mrs. Constant are awarded for the filing of a frivolous notice of appeal under F. R. Civ. P. 11 and Bankr. R. 9011(a).

CONCLUSION

1. Mr. Constant's purported appeal from the Bankruptcy Court is DISMISSED.

2. Appellant Mrs. Constant's appeal from the Bankruptcy Court is DISMISSED.

3. Appellee's request for sanctions is GRANTED, and appellee is awarded his reasonable attorney's fees and costs in defending this appeal against Mr. and Mrs. Constant, jointly and severally.

4. Within 20 days hereof, appellee shall file and serve his declaration and any supporting papers setting forth the amount of fees and costs claimed. Appellants are granted 14 days from the date appellee's declaration is served on them within which to file any opposition thereto. The matter of the amount of fees and costs shall then stand submitted.

Dated: Nov. 19, 1993

A. WALLACE TASHIMA
UNITED STATES
DISTRICT JUDGE

28 USC 1334 Bankruptcy Cases And Proceedings

(a) Except as provided in subsection

(b) of this section, the district courts shall have jurisdiction of all cases under title 11.

28 USC 157(b)(2)(H) Procedures

(2) Core proceedings include ...

(H) proceedings to determine, avoid, or recover fraudulent conveyances.

11 USC 544(b)

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under **applicable law** by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 of this title.

Bankruptcy Rule 7012 incorporates Civil Rule 12(h)(3), which provides:

Whenever it appears by **suggestion** of the parties **or otherwise** that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

28 USC 1962 Lien

Every judgement rendered by a district court within a State shall be a lien on the property located in such State in the same

manner, to the same extent and under the same conditions as a judgement of a court of general jurisdiction in such State .....

35 USC 261 Ownership; Assignment

. . . . . patents, or any interest therein, shall be assignable in law by an instrument in writing. The ... patentee, or his assigns or legal representatives may in like manner may grant and convey an exclusive right under his ... patents, ..

An assignment ... shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from the date or prior to the date of such subsequent purchase or mortgage.